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FILE

June 25, 1992

BY HAND

Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: CC Docket No. 92-90: In The Matter of The  
Telephone Consumer Protection Act of 1991

Dear Sir or Madam:

Enclosed please find the original and nine copies of the Reply Comments of Mr. Fax in response to the above-named Notice of Proposed Rulemaking. Pursuant to 1 CFR 1.419(b), please distribute these Reply Comments to the Bureau, Information Office, and Commissioners.

Thank you,



Daniel L. Brenner

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Encl.

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JUN 25 1992

**FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

Federal Communications Commission  
Office of the Secretary

In the Matter of )

The Telephone Consumer )  
Protection Act of 1991 )

CC Docket No.  
92-90

REPLY COMMENTS OF MR. FAX

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## **REPLY COMMENTS OF MR. FAX**

Mr. Fax, by its counsel, LeBoeuf, Lamb, Leiby & MacRae, respectfully submits these Reply Comments regarding the Federal Communication Commission's ("Commission") Notice of Proposed Rulemaking and Request for Comments thereon, released April 17, 1992, in the above captioned matter.

### **I. SUMMARY**

Mr. Fax concurs with the Comments filed in response to the Notice of Proposed Rulemaking in this matter by National FaxList and by Sprint Corporation, to the extent that those comments recognize that transmission of unsolicited facsimiles is an efficient business practice, protected by the First Amendment. Mr. Fax is a speaker, no less so than other advertisers of products and services. In light of the points made by those commentators, these Reply Comments urge that any outright ban on such transmission is not consonant with well-established First Amendment principles. Such a ban would be particularly suspect where, as here, the factual underpinnings cited by Congress in the legislative history of the Telephone Consumer Protection Act are minimal at best.

Mr. Fax's initial Comments proposed, as an alternative to a flat ban, a system of regulation which demands that permission be extracted from potential facsimile recipients prior to transmission. Further reflection on the Comments furnished by others has persuaded Mr. Fax that such an alternative would be unworkable and constitutionally infirm. A less onerous requirement should be adopted. It goes without saying that the proposed Commission rule, without more, does not prohibit Mr. Fax

from continuing to send facsimile announcements to businesses with whom it has established a prior customer relationship.

**II. TRANSMISSION OF UNSOLICITED ADVERTISING FACSIMILES IS CONSTITUTIONALLY PROTECTED SPEECH WHICH CONGRESS HAS NOT FURNISHED A JUSTIFICATION FOR BANNING**

As was pointed out in Mr. Fax's initial Comments, commercial speech, including such speech transmitted by facsimile, is constitutionally protected. Mr. Fax is one of a new generation of fax speakers who will use paper and paperless fax transmission to communicate efficiently and effectively. Although protected speech may be regulated, an intermediate level of scrutiny generally is applied by the courts to determine whether the regulation is justified by a sufficiently important government interest, and whether there are other means to serve that interest without interfering with protected speech.

In light of the Comments furnished to the Commission by Mr. Fax and National FaxList, it appears that unsolicited facsimiles do not pose a problem of sufficient magnitude -- indeed of even a quantifiable minute degree -- that there is a justifiable government interest in curbing such transmission.<sup>1</sup> This dearth of evidence relating to faxes, reflected in the paucity of discussion in the Commission's Notice, contrasts sharply from the parlous state of affairs relating to autodialers. But there, instead of a Draconian approach, the Commission has considered a more lenient strategy.

Indeed, Congress specifically reported that because consumers find "automated or prerecorded telephone calls . . . to

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<sup>1</sup> National Faxlist points out that only 3 in one thousand recipients of unsolicited facsimiles complain.

be a nuisance and an invasion of privacy"<sup>2</sup>, regulations are necessary to remedy that problem. But Congress developed no record whatsoever on the issue of whether consumers object to receiving unsolicited commercial faxes. Congress stated no justification or substantial interest at all for the facsimile portion of the legislation. Rather, the facsimile portion of the legislation seems to have arisen in an almost offhand way. The sole reference to any justification at all was an unsupported assertion made by Senator Hollings, introducing the Act:

These [unsolicited faxes] prevent the owners from using their own fax machines for business purposes. Even worse, these transmissions force the recipient to pay for the cost of the paper used to receive them. These junk fax advertisements can be a severe impediment to carrying out legitimate business practices and ought to be abolished.

137 Cong. Rec. S9840-02 (daily ed. July 11, 1991) (statement of Sen. Hollings).

Senator Hollings appears to have assumed that unsolicited facsimile transmission itself is not a "legitimate business practice", even though it is abundantly clear that much legitimate business is commenced in precisely this manner. As Sprint Corporation points out in its initial Comments, advertising through facsimile and other telemarketing devices has "great competitive value and additionally provide[s] benefits to purchasers of telemarketed products."<sup>3</sup> Senator Hollings'

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<sup>2</sup> Telephone Consumer Protection Act, § 2(10).

<sup>3</sup> Comments of Sprint Corporation, p. 2.

statement does not take into account many peoples' desires to receive unsolicited advertising facsimiles, and effectively (and erroneously) equates "unsolicited" facsimiles with "unwanted" facsimiles.

As is frequently the case with speech, however, what annoys one person may be appreciated by another. As the U.S. Supreme Court has noted, "one man's vulgarity is another's lyric."<sup>4</sup> In this situation, in particular, National FaxList's figures indicate that the overwhelming number of recipients have no objection to receiving unsolicited facsimiles. This fact is consistent with the findings in a survey conducted by Mr. Fax of its own target market of facsimile users, which demonstrated that a large majority of fax users favored receiving facsimiled advertisements. Additionally, as president Alan Morris makes clear in his Declaration, attached hereto at page 14, the regular and sound business practice of Mr. Fax is to discontinue transmitting its advertising facsimiles to recipients should they ever express their desire not to receive them.

Senator Hollings' lone comment, noted above, however heartfelt, does not rise to the level of a legislative finding. And, where a legislative body fails to make findings in support of a statute which restricts speech, as this one does, the courts have not hesitated to strike down the offending legislation. In National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir. 1991), the court upheld the trial court's decision to strike down five municipal anti-billboard ordinances. The court found

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<sup>4</sup> Cohen v. California, 403 U.S. 15, 25, 915 S.Ct. 1780 (1971).

that these ordinances were violative of the First Amendment because the ordinances "did not identify the particular government interests sought to be advanced and the towns failed to introduce any extrinsic evidence of the interests underlying the ordinances." Id. at 556. Said the court, "[w]e have been unable to find any case where a court has taken judicial notice of an unstated and unexplained legislative purpose for an ordinance that restricts speech." Id. at 555-56.

In addition, neither the Comments filed with respect to the proposed fax transmission rule nor the Commission's Notice add the necessary factual supplement to Congress' factual void in this proceeding.

Further, even if evidence exists, which it does not, to demonstrate that a majority of recipients objected to receiving these facsimiles, this evidence would not constitute grounds simply to ban their transmission. The First Amendment is not always a costless proposition in a free society. Citizens must tolerate interruptions from unwanted door-to-door solicitors,<sup>5</sup> the inconveniences posed by parades down the streets of their cities,<sup>6</sup> and the annoyance of pamphleteers at shopping centers.<sup>7</sup> The few pennies paid by recipients is a relatively small cost in the context of the First Amendment freedom to send and receive messages.

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<sup>5</sup> See, e.g., Martin v. Struthers, 319 U.S. 141, 635 S.Ct. 862 (1943).

<sup>6</sup> See, e.g., Shuttlesworth v. Birmingham, 394 U.S. 147, 89 S.Ct. 935 (1969).

<sup>7</sup> See, e.g., Pruneyard Shopping Center v. Robins, 447 U.S. 74, 100 S.Ct. 2035 (1980).

**III. IN LIGHT OF THE PROTECTED NATURE OF FACSIMILE ADVERTISING,  
THE COMMISSION SHOULD INTERPRET THE ACT IN THE LEAST  
RESTRICTIVE MANNER POSSIBLE**

In our Comments, we demonstrated the constitutional shortcomings, in terms of vagueness and overbreadth, that a flat prohibition on "unsolicited" facsimiles presents. The Comments of Sprint reinforce the legal infirmity that such a prohibition raises.

At the same time, Mr. Fax recognizes that the Commission is not free to ignore the wishes of Congress to implement restrictions on unsolicited faxes, so long as those restrictions can possibly be harmonized with the First Amendment's protection of free expression.

Of course, the Commission should not adopt a facially unconstitutional scheme, such as a literal ban on all unsolicited advertising facsimiles. As the Court of Appeals noted in Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987), "[f]ederal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it. U.S. Const. art. VI , cl. 3. To enforce a Commission-generated policy that the Commission itself believes is unconstitutional may well constitute a violation of that oath." Id. at 874. The Meredith opinion dealt with a Commission-generated policy rather than one generated by Congress. Nevertheless, the duty not to enact unconstitutional regulations remains, even if the regulations are adopted pursuant to a Congressional mandate to enter a field.

Mr. Fax agrees that it would be "unseemly" for the Commission to refuse to enact regulations which Congress directs it to enact. (See Action for Children's Television v. FCC, 932

F.2d 1504 (DC Cir. 1991). The Commission's clear duty, however, is to make every effort to interpret Congressional dictates in a constitutional manner where there is room to do so. Just as the Commission could not adopt unconstitutional regulations relating to facsimiles on its own (e.g., a rule that forbade racial minorities from sending facsimiles), so too it cannot simply adopt an unconstitutional directive from Congress without attempting to reconcile it with the First Amendment.

Pursuant to the Commission's duty to interpret Congressional directives in a manner which least offends the Constitution, Mr. Fax believes it is incumbent upon the Commission to enact regulations which define Congress' phrase "unsolicited facsimile" so it poses the least possible interference with facsimile transmission. To interfere with such communication more than is necessary would be in plain violation of fax speakers' First Amendment rights.

Even where Congress has vested broad discretion in an agency to regulate a field and notwithstanding the great deference courts afford to an agency's judgment in promulgating its regulations, it is well-settled that administrative actions are still subject to judicial review where constitutional protections are implicated. 5 U.S.C.A. § 706(1)(b) (West 1977 & Supp. 1992); Doe v. Casey, 796 F.2d 1508, 1517-1518 (1986), aff'd in part and rev'd in part, 486 U.S. 592, 603-604 (1988) (action by Director of CIA pursuant to statute is reviewable when based on colorable constitutional claim). By taking a measured approach at the outset, the Commission avoids the inevitable and costly lawsuits engendered by the promulgation of unconstitutional regulations.

This situation calls to mind such cases as Action for Children's Television, supra, and Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 109 S.Ct. 2829 (1989). In Sable, the Commission's ban of indecent interstate commercial telephone messages was held to be unconstitutional as exceeding that necessary to serve the government's interest in protecting minors from such messages.

Here, as in Sable, the proposed regulation of protected speech is far more heavyhanded and all-encompassing than is necessary to achieve Congress' (or at least Senator Hollings') stated purpose. It is truly an instance, as Justice White called it, of "burning up the house to roast the pig". Sable at 2839.

Further, here, as in Sable, there is a fatal dearth of evidence other than the conclusory statements of Senator Hollings cited above in support of a "considered judgment" as to what was Congress' purpose in enacting the relevant provision. See Sable at 2838-39. The like statements of Representatives Bliley, Coats and Hatch in Sable were found equally insubstantial.

In our Comments we proposed, as one alternative, that the Commission require fax speakers to obtain permission prior to sending advertising facsimiles. On further reflection, and in light of the other comments filed, we believe that such a solution would be unworkable.

It would present the Commission and fax speakers like Mr. Fax with an enforcement nightmare. For example, suppose a facsimile speaker were to assert that permission was obtained from the recipient, or from one of the recipient's employees, prior to transmission. The employee, however, may not be

authorized to give permission for the company or for all of the fax machines at the company.

Fax operators at a business may be low-level personnel or temporary hires, whose lack of authority to "waive" the federal statute may not be apparent. A fax speaker would be obliged to engage in fact-finding as to who was granting permission.

Even after such efforts, a fax speaker might still be liable if the authority was not valid. The prior approval model would also create the necessity of personal contacts with recipients prior to sending facsimiles. These attempts to contact would-be recipients would impose a greater burden on the recipients than would receipt of the facsimile itself.

Mr. Fax concurs with the Comments of National FaxList. It proposed a system wherein facsimile owners who do not wish to receive unsolicited facsimiles would register with a national database, as unwilling recipients of direct mail may now do. Mr. Fax would participate in such an arrangement and would not object to a regulatory scheme which made the transmission of unsolicited facsimiles to recipients who are listed in the database unlawful.

An alternative, perhaps less cumbersome approach is also hereby offered. Mr. Fax would favor a regulation which requires a fax speaker to list a toll free number on its initial and subsequent faxes through which the recipient can notify the fax speaker that the recipient desires no additional faxes. Once notification is received, the further sending of faxes would constitute transmission of "unsolicited" faxes, in violation of the statute and punishable by the FCC. The FCC could further limit the sending of such faxes to overnight, nonbusiness hours

so as to minimize the interference with other uses of recipients' fax machines.

This approach toward "unsolicited advertising" reduces the constitutional shortcomings of a Draconian adherence to a flat ban while providing a convenient way for those not wishing to receive certain fax messages to indicate this desire to fax speakers. Moreover, it conforms to the generally accepted notion of "unsolicited" in the advertising context.

There are many items of direct mail, for example, which are technically "unsolicited" and which do not result in a purchase by the receiver. Nevertheless the mail pieces are useful because they disclose product availability, provide a means of price-comparison, and give the receiver an opportunity to consider whether a purchase is desired. These speech activities, protected by the U.S. Supreme Court for over fifteen years,<sup>8</sup> are valuable to many receivers even though they may not be directly "solicited."

Further, the approach proposed herein incurs a total cost to recipients of one piece of fax paper before the recipient can declare that further solicitations are not desired. This imposition is particularly trivial when compared to the costs and inconvenience of opening and discarding unwanted direct mail pieces from the same advertiser over many weeks, months, and even

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<sup>8</sup> See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817 (1976).

years.<sup>9</sup> The cost to the consumer is insubstantial for an 800-number cancellation approach to faxes. And this approach preserves the right of fax speakers and recipients to communicate with each other until the recipient expresses a desire for no further faxes. Thereafter, any additional faxes would be deemed to be "unsolicited" and unlawful.

To summarize, Mr. Fax would favor the following formulation: "Unsolicited advertising" by fax is defined as a fax advertisement sent after notice has been received by the fax speaker by means of a toll-free number supplied by the sender that the recipient does not wish to receive any further faxes. In any case fax advertisements not specifically requested by the receiver shall be sent only after 8:00 p.m. and before 7:00 a.m. in the receiver's time zone on business days. Such advertisements must contain a toll-free number by which the receiver may demand that no further faxes be sent.

**IV. AT THE VERY LEAST, THE COMMISSION SHOULD PROPOUND ANOTHER NOTICE OF PROPOSED RULEMAKING REQUESTING COMMENTARY ON THE CONSTITUTIONALITY OF THE FAX PROVISION**

Where, as here, Congress has delegated decision-making authority in a particular area to an administrative agency, that agency must exercise its exercise of discretion in a manner which evinces a reasoned analysis. At present, there is nothing in the record, either in the legislative history or the Notice of Proposed Rulemaking, constituting findings, or statements of

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<sup>9</sup> While direct mail recipients can inform the Direct Mail Association to be removed from all lists, it may not be feasible to be removed from some but not all lists. This may explain why more people don't elect to refuse all direct mail. The fax alternative allows for selective refusals.

basis and purpose for the facsimile provision. This absence of stated rationale renders the proposed regulation arbitrary and capricious under the standard enunciated by the U.S. Supreme Court in Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 103 S. Ct. 2856 (1983). Under this standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Id. at 2866 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168, 83 S.Ct. 239, 245-246 (1962)). In a communications-specific context, it has been held that "If an agency does not supply a reasoned basis for its actions, the courts are not to supply one." Action for Children's Television v. FCC, 821 F.2d 741 (DC Cir. 1987).

Since the proposed regulations would not presently survive constitutional muster given the absence of reasoned analysis and findings by Congress and the Commission, Mr. Fax urges the Commission to propound a further Notice of Proposed Rulemaking requesting commentary on this specific issue, so that a reasoned approach may be taken. Such Notice would furnish justification, beyond that offered in Senator Hollings' lone statement, for the proposed regulations' interference with protected speech.

## **V. CONCLUSION**

In light of the initial Comments furnished by other Commentators, specifically Sprint Corporation and National FaxList, Mr. Fax urges the Commission to take an approach to regulation of the transmission of unsolicited facsimiles which will reflect the degree to which such communication is protected

by the Constitution, and the lack of factual underpinning for the facsimile provisions of the Act. Mr. Fax further urges the Commission to regulate in a manner which will not impose a greater burden on recipients of unsolicited facsimile transmissions than presently exists.

Respectfully submitted,

June 25, 1992

LeBoeuf, Lamb, Leiby & MacRae

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## DECLARATION OF ALAN MORRIS

I, Alan Morris, declare:

1. I am the President of Mr. Fax, a company which advertises by facsimile communications directed to its customers and potential customers. Our product line includes merchandise which would be of use to facsimile users, such as fax paper and fax machine toners.

2. Mr. Fax sends facsimiles of one page at night to its customers and potential customers. Every facsimile sent by us includes a toll-free, 24 hour, number which the recipient may call to request that no facsimiles be sent in the future. Such requests are scrupulously honored.

3. It would not be in Mr. Fax's interests to continue to send faxes to persons who do not desire to receive them, since these individuals are very unlikely to purchase from the faxes if they object to their receipt. Therefore it is in Mr. Fax's interests to promptly remove any person or business from our list who desires it.

4. Mr. Fax has found that less than 3 people per 1000 object to our faxes and request removal from our list. As a general rule, a much larger number per thousand can be expected to use the fax in a positive manner, either by purchasing directly from the fax, or by calling us for more information as a result of its receipt.

5. Mr. Fax's existing customers clearly appreciate receiving our faxes. It would not be in our best interests to jeopardize our relationships by angering those who buy from us, and we would not send faxes to our customers if we thought they did not want to receive them. Mr. Fax has also found that we can expect a higher percentage response rate to facsimile advertising than to direct mail or media advertising, suggesting this media has greater consumer appeal.

6. I have read the Commission's notice of Proposed Rulemaking. The proposed Regulation bearing on transmission of unsolicited facsimiles, in its present form, would effectively prevent Mr. Fax from efficiently conducting its business, and could result in a substantial loss of business among our current customers, and the potential for the termination of some or all of the jobs of our 48 employees.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: 6/18/92

Alan Morris  
Alan Morris